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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 116

IN THE MATTER OF THE APPLICATION

OF

PAUL L. GAULT and MARJORIE GAULT,

Father and Mother of

GERALD FRANCIS GAULT, a Minor.

On Appeal from the Supreme Court of Arizona

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Parents Committee hereby respectfully moves for leave to file a brief amicus curiae in this case, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has failed to grant his consent.

THE INTEREST OF THE AMERICAN PARENTS COMMITTEE

The American Parents Committee is a non-profit, non-partisan, public service association working for federal legislation on behalf of the nation's 71 million children. On the Committee's National Council are represented leaders in child and public welfare, research and education, community and professional organizations, business and local government from 39 states. For nearly 20 years the American Parents Committee has taken an active interest in national legislation pertaining to the rights and conditions of children and has worked in cooperation with other organizations and with governmental agencies to improve the understanding of the child's rights and duties in our society. The Committee seeks to file a brief amicus curiae because it believes that the case now before this Court poses questions which are of great importance to all parents and children, as well as to the American community at large.

More than 36 percent of the population of this country is subject not to adult criminal tribunals but to juvenile courts. These courts, although performing a specialized function, nevertheless administer justice. The question of what type of justice is being dispensed in juvenile courts, and through what methods and procedures, is of critical importance to us as an organization dedicated to problems of parents and children. Naturally, these questions also have a direct bearing upon this nation's system of justice and social well-being.

Briefly stated, the compelling question now before the Court is: Can a parent be deprived of the custody of his child and can a child be committed until maturity without knowing specifically beforehand what misconduct is charged to the child, without an opportunity of facing the witnesses to such misconduct, and without the assistance of legal counsel? Beyond this question, the case also presents other important issues: How effective is the specialized system of justice, made applicable to juveniles, in protecting the rights of the alleged delinquent child, the rights of his family and the rights of the community? Does our constitution prohibit the exercise of any social sanctions by government, whether designated criminal or civil, adult or juvenile, unless the accused or the subject of such sanctions is accorded certain standards of due process? Will not the aims of the juvenile courts, in developing responsible citizenship, be furthered by allowing the child more of an experience with the safeguards of constitutional guaranties? Will the system of juvenile courts not benefit from added public confidence by injecting into the system such standards of due process as will free these specialized courts of any imputation of vestiges of judicial incompetence, neglect and ineffectiveness?

The brief amicus curiae tendered herewith discusses both the specific questions and the general issues contained in this case. It is the conviction of this amicus curiae that its brief seeks to produce a balance between societal and individual interests and thus contributes a sense of general perspective not contained in the adversary briefs.

For the above-stated reasons, we respectfully urge this Court to grant this motion for leave to file the accompanying brief amicus curiae in the instant case.

Respectfully submitted,

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BRIEF FOR THE AMERICAN PARENTS COMMITTEE AS AMICUS CURIAE

The interest of The American Parents Committee is set out on Pages vii-ix of the foregoing Motion for Leave To File a Brief Amicus Curiae.

The position of The American Parents Committee is symptomatic of an increasing public concern for the treatment of juvenile offenders consistent with funda-

mental fairness. It is further founded on the conviction that the public interest requires a careful review of the legal foundation, as well as the accomplishments and record to date, of the juvenile court institution, upon this sixty-seventh year of its commencement as a new social experiment. Dedicated to the rehabilitative and preventive aims of the juvenile court, the sponsors of this brief believe that such review of standards and proceedings will aid, rather than weaken, the public role of the juvenile court.

I. INTRODUCTION—THE SIGNIFICANCE OF THIS CASE

Children who are within the age group subject to the jurisdiction of the juvenile court numbered 71 million and accounted for 36 percent of our national population in 1965.[1] It is noteworthy that of this large youth population, only some 4 percent ever get involved in delinquency problems. (Excerpts from statement of J. Edgar Hoover, Congressional Record, Sept. 27, 1966, pp. 23073-23074). Still, in terms of the nation's crime and delinquency problems, youthful offenders play an unfortunately important role. It is reported that persons under 18 years of age comprised 21 percent of the police arrests of all criminal acts in 1964, and 48 percent of all arrests for the more serious offenses. Of the more than 1 million youths under 18 arrested, some 697,000 were finally brought to the attention of the juvenile courts. Of these cases, 370,000 were disposed of by the court's staff and 327,000 were disposed of judicially.[2] Finally, a total

[1] Current Population Reports, Population Estimates, Series P-25, No. 321, Nov. 30, 1965, Bureau of Census.

[2] Juvenile Court Statistics—1965. Children's Bureau Statistical Series now in process.

of 88,824 persons were sentenced to federal and state penal institutions in 1963, while 39,511 youths were committed to juvenile institutions in 1964.[3] Likewise, in 1960 a total of 212,953 inmates were held in federal and state prisons, while 56,516 youths were in the custody of training schools and detention homes.[4]

The importance of this case rests, therefore, not only on the fact that it contains significant issues of Federal constitutional law. Its added significance is derived from the fact that this case poses the overall question of whether our constitutional law precepts will permit the operation of a system of social control, parallel but distinct from criminal law, which will be free from the traditional formalities and safeguards made applicable to the latter. Indeed, it is unclear from existing authorities whether juvenile courts are free from standards imposed upon administrative agencies.

At its inception, the establishment of the juvenile court was hailed by Dean Roscoe Pound as "one of the most significant advances in the administration of justice since the Magna Carta." Earlier this year, this Court recognized, however, that "there is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protections afforded to adult nor the solicitous care and regenerative treatment postulated for children." Fortas, J. in *Kent* v. *United States*, 383 U.S. 541, 556 (1966). It is the position of Amicus

[3] Statistical Abstract of the United States, 1965, p. 158; H.E.W., Statistics on Public Institutions for Delinquent Children: 1964, table A, pp. 20-25.

[4] Statistical Abstract of the United States, 1965, pp. 157, 158.

Curiae that children are too important to be thus allowed to receive the worst of both worlds.

It is the purpose of this brief amicus curiae to call to the attention of the Court the multitude of legal as well as social issues involved in the structure and operation of the juvenile court process. The sponsors of this brief do not believe that the issues contained in this case can and should be properly resolved on the basis of a technical construction of legal arguments and stereotyped verbiage alone. The public interest in furthering the social aims postulated for the juvenile court require that any critical assessment of the juvenile court process, and any possible disturbance of the present balance, not be undertaken without attention to the actual day-to-day operations and practices, as well as the total social accomplishments, of the juvenile process. In assessing the constitutional legitimacy of actions taken under the separate juvenile process, this Court need not be limited to traditional criminal standards only, but must, in fact, determine whether the aims and operations of the juvenile system to date indeed have produced such substitute or equivalent guaranties as to satisfy the broader meanings of our constitutional due process requirements.

In this connection, it is truly said, and in respect of juvenile as well as of criminal proceedings, that "due process of law is not for the sole benefit of an accused. It is the best insurance for the government itself against those blunders which leave lasting stains on a system of justice . . . ." Jackson, J., in *Shaughnessy* v. *U. S.*, 345 U.S. 206, 224-25 (1953).

II. THE FACTS OF THE CASE

On June 8, 1964, when he was 15 years old, Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County. The arrest was the result of a complaint by one Mrs. Cook, a neighbor of the boys, about lewd telephone calls made to her. Gerald was at that time on six months' probation following an incident in February, 1964, involving a charge of theft. (Transcript of Record 4). No record exists of the earlier incident other than a referral report of the probation department to the court.[5]

The decision to detain the children in this case was made by probation officers Flagg and Henderson. Mr. Flagg interrogated Gerald at length during detention on the evening of June 8 and the morning of June 9. No notice of the detention or the charge was given to Gerald's parents. When Mrs. Gault returned from work on the evening of June 8 and learned from the neighbors about Gerald's detention, she went to the detention home and discovered that a hearing was to be held at 3 p.m. the following day.

On June 9 a petition charging Gerald with juvenile delinquency and alleging the lewd telephone calls was filed with the court by probation officer Flagg. Gerald's parents did not receive any notice of the petition. The same day a hearing was held in the chambers of the juvenile judge. Gerald, his mother and his older brother were present in addition to the probation officers. The father was not present due to his being

[5] Since the proceedings against Gerald Gault in the instant case were commenced with a regular petition and no record exists of the prior charges or disposition, this brief must unavoidably treat the instant case as a new proceeding and not one of a terminated probation.

out of town on work. No one was sworn as a witness at this hearing, no transcript was made, no witnesses were called against Gerald and no report was prepared by either the judge or the probation officers.

Gerald alone testified at the hearing regarding the telephone calls. Absent a transcript, there was later conflict as to what had been said. Mrs. Gault recalled that Gerald had said he merely dialed Mrs. Cook's number while his friend talked to her. The judge and the probation officers, on the other hand, testified that Gerald admitted saying some of the lesser but not the more serious lewd words. At the conclusion of the hearing, the judge indicated that he would "think over" the disposition of the case.

In the afternoon of June 12, Mrs. Gault received a written note from officer Flagg to the effect that a further hearing was to be held on June 15. At the subsequent hearing, Mr. and Mrs. Gault were present. Mrs. Cook, the complaining witness was not present. Probation officer Flagg had talked to her only once, on the telephone, regarding her complaint. The judge had not spoken to her at all. In answer to Mrs. Gault's inquiry, the judge responded that Mrs. Cook was not required to be present at the hearing. A conflict again exists regarding Gerald's testimony at the second hearing. There is a controversy as to whether Gerald admitted only dialing Mrs. Cook's phone or whether he also admitted making the lesser obscene remarks. No other evidence was given.

The parents were never given a copy of the delinquency petition regarding Gerald which was filed on June 9. They were not informed of the right to counsel and the right to confront and cross-examine wit-

nesses. At no time during either hearing were Gerald's home conditions discussed or reviewed. The only investigation was allegedly conducted in February, 1964, when Gerald had originally been put on probation.

Subsequent to the June 15, 1964, hearing, the judge made a finding of juvenile delinquency and committed Gerald to the State Industrial School. No particular grounds were specified by the judge for this decision other than a subsequent explanation that Gerald was "habitually involved in immoral matters". The judge also stated subsequently that he thought the telephone calls amounted "to disturbing the peace." Under § 8-236 B of the Juvenile Code of Arizona, a commitment of a child is to "be for the term of the child's minority" unless he is discharged sooner by the institution's board of directors. Under the Arizona laws, the maximum penalty for an adult convicted of using obscene language over the telephone cannot exceed a two month jail term.[6]

III. THE ISSUES OF THE CASE

We believe that this case urgently presents the following questions:

1. Is the Arizona Juvenile Code (A.R.S. § 8-201-8-239) violative of the due process clause of the Fourteenth Amendment, because it confers unlimited discretion on the juvenile judge, without providing standards to prevent its arbitrary abuses, and further fails to provide the child charged with delinquency and his parents with the following safeguards: a. the right to a timely notice of the hearing and of the charges; b. the right to counsel; c. right to confronta-

[6] Arizona Stats. § 13-377.

tion and cross-examination of witnesses; d. the privilege against self-incrimination; e. the right to a juvenile court transcript and appellate review?

2. Are a delinquency petition and a juvenile court disposition of sufficient adverse effect upon the liberty and future of a child to require that he and his family be afforded all the constitutional safeguards applicable to criminal proceedings?

3. Can a state legislature deprive a person of traditional constitutional safeguards by subjecting him assertedly under the parens patriae doctrine, to a specially designed system of social sanctions which is defined as therapeutic and non-criminal?

IV. SUMMARY OF ARGUMENT

1. No system of social sanctions, however designated, which is authorized to deprive a person of his freedom and to separate him from his family can be exempt from constitutional safeguards.

2. Our constitutional precepts do not allow for the existence of two systems for dispensing justice: one legal and the other extra-legal.

3. The adversary system of justice, however criticized and modified, still remains the best guaranty for maintaining the necessary balance between societal and individual interests, and continues to afford the best protection against inequity and the abuse of discretion.

4. The absence of counsel deprives the child of needed protection while equally removing from society, which pays the bill, an important auditing and scrutiny device to protect against inadequate and socially wasteful dispositions.

5. Depriving children of legal safeguards available to adults is not only objectionable from a constitutional point of view, but tends also to adversely affect their development towards responsible adult citizenship.

6. Our concept of justice has traditionally emphasized procedural guaranties over human discretion, adversary process over inquisitorial justice. While the institution of additional safeguards in the juvenile court will require more staff and the expenditure of time—these are the expected costs of American justice.

7. The juvenile court, sheltered from both public and professional scrutiny, has become suspect to both those who are concerned with the denial of due process and those suspicious of the coddling assertedly going on in chambers. After half a century as an unproven social experiment, juvenile process needs to go more into the open and is likely to benefit from the opportunity for a public assessment.

V. ARGUMENT AND COMMENTS

The creation of the juvenile court in a "civil", "informal" and "therapeutic" image is part of an overall movement in American law which has been seeking new formats for dealing with deviate and antisocial behavior outside the traditional boundaries of criminal law. Derived from moral sensitivity, the availability of new behavioral data, and a disappointment with the past accomplishments of criminal justice, the new trend has attempted to do away with such concepts as guilt and punishment and seeks to substitute for them a terminology of illness, delinquency and therapy. Beginning a hundred and fifty years ago with the founding of mental hospitals for the civil commitment of the mentally ill, allowing for the separation

of the "lunatick" from the regular vagrant and criminal,[7] society has continuously been moving away from the traditional resort to criminal law as a primary tool of social defense. The establishment of juvenile courts in 1899[8] was another step toward the divestment of criminal law of a past sphere of jurisdiction, followed in the nineteen-thirties by the special "civil" procedures made applicable to psychopaths[9] and the recent reforms pertaining to the civil treatment of alcoholics[10] and drug addicts.[11]

All of these "civil" and "therapeutic" areas of the law share the question of whether a change in terminology, even a change in the asserted social aims and possibly even in the institutions wherein treatment is afforded, are sufficient to justify a dispensation from constitutional safeguards. This question would obviously be totally avoided if the new social aims and the treatment under them would be directed to willing clients only. It is the use of society's authority over unwilling recipients that changes all these "civil-

[7] The first hospital devoted exclusively to the mentally ill was erected in Virginia in 1773. It remained the only one in the country until the establishment of an asylum in Lexington, Kentucky, in 1824. For a history see, Deutsch, The Mentally Ill in America 42, 95 (1938); Lindman and McIntyre, The Mentally Disabled and the Law 6-14 (1961).

[8] See historical account in Vedder, Juvenile Offenders 143, 144 (1963).

[9] In 1938, Illinois became the first state to enact a sexual psychopath statute. For a history, see Lindman and McIntyre, The Mentally Disabled and the Law 298-313 (1961).

[10] Driver v. Hinnart, 356 F. 2d 761 (C.A. 4th Ct.), 1966; Easter v. District of Columbia, 361 F. 2d 50 (C.A.D.C.) 1966.

[11] See the discussion of criminal versus civil controls in Robinson v. California, 370 U.S. 66 (1962).

therapeutic'' procedures from a treatment program to a social sanction. This being the case, both a deprivation of liberty and a resultant stigma cannot be avoided. Consequently, the following questions must be squarely met in this as well as in the other "civil", "therapeutic" areas: Which of the constitutional safeguards must continue to be preserved despite the asserted change in aims and procedures? How can we prevent stifling necessary progress in the law through unnecessary insistence upon safeguards no longer needed?

A brief reference to juvenile court procedures is necessary. The juvenile court has been described as an " 'informal' court, a 'private' court and a 'therapeutic' court. That is to say, the procedures of the court are marked by informality and something of the 'conference' as opposed to 'trial' atmosphere; its business is regarded as a confidential matter . . . ."[12] Likewise, the juvenile court was conceived as a tool not of punishment but of rehabilitation, a tribunal that will carefully search into the social and psychological makeup of the youth before it in order to determine the most effective methods of treatment. Since the view was prevalent, from the inception of juvenile court, that juvenile proceedings are not criminal, it was thought unnecessary to apply to them the same substantive and procedural standards required in adult criminal proceedings.[13] Thus, it is not clear if the right to a formal hearing and to counsel applies in juvenile court proceedings in American courts.

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[12] Skoler, Juvenile Courts and Young Lawyers, 10 The Student Lawyer J. 5, 6 (1964).

[13] Sussman, Juvenile Delinquency, pp. 11-16 (1955). For a more detailed account of recent juvenile court practices in such areas as hearing, evidence and right to counsel, see Paulsen, Fairness to the Juvenile Offender, 41 Minn. L.R. 547 (1957).

In recent years, however, there has been an increased awareness and recognition that the due process concept should place "some" constitutional limitations on how juvenile courts dispose of their business.[14] Indeed, the definition of these limitations has recently become of increasing interest and concern.[15] In part, this concern has been the product of a questioning attitude towards the true contents and effect of juvenile proceedings, which may result both in a deprivation of liberty and a degree of social condemnation. "While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of a crime, nevertheless, for all practical purposes this is a legal fiction, presenting a challenge to credulity and doing violence to reason."[16] Likewise, there is evidence that the designation of a judge to hear juvenile cases does not of itself imbue him with the philosophy upon which the juvenile process is predicated. [See Davis, Iowa Judge and the Juvenile Court, 34 Iowa L. R. 634 (1949)]

Some early critics of the juvenile court procedures have based their plea for constitutional safeguards primarily on the grounds that the therapeutic aim of

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[14] Tappan, Juvenile Delinquency, pp. 172-173 (1949); Skoler, Juvenile Courts and Young Lawyers, 10 The Student Lawyer J. 5 (1964). Rubin, Protecting the Child in the Juvenile Court, 43 J. Crim. L. and Crim. 425 (1952).

[15] Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957); Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387 (1961); Beemsterboer, The Juvenile Court—Benevolence in the Star Chamber, 50 J. Crim. L. & Crimin. 464 (1960); Quick, Constitutional Rights in the Juvenile Court, 12 Howard L.J. 76 (1966); Allen, The Borderland of Criminal Justice (1964); Remington, Due Process in Juvenile Proceedings, 11 Wayne L. Rev. 688 (1965).

[16] In re Contreras, 241 P. 2d 631 at 633 (1952).

the court does not dispense with the need to prove initially, and within the standards of due process, the child's involvement. This would appear to be fundamental and inescapable, for delinquency is a charge to be proven not a premise on which to proceed. To hold otherwise would place the burden of proof of innocence of involvement upon the child and his parents, and further would deny them necessary aids[17] to carry this burden.

But the fear of an unsubstantiated finding of delinquency was followed by a host of other concerns: Will the judge give his most sympathetic consideration to the question of disposition unless the charged child has an opportunity to effectively present the most favorable aspects of his case? Will the most useful social solution be reached if the judge relies only on an unchallenged report by the court staff without an effective response? How are we to guarantee against undue haste, neglect and abuse in juvenile court, instead of the postulated parental patience and forebearance, when almost one-fourth of the nation's juvenile judges are not trained in the law and more than half devote less than one-fourth of their time to juvenile and family matters.[18]

"All jurisdictions have juvenile codes and all provide for less than the full set of due process guarantees available in a criminal proceeding", said the Supreme Court of Arizona in the instant case. (Jurisdictional Statement, p. 31) Thus an up-to-date survey

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[17] Cf. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[18] Biographical Data Survey of Juvenile Court Judges, George Washington University Center for Behavioral Sciences (monograph, 1964) pp. 10, 21.

of the widespread nation-wide denial of constitutional safeguards in juvenile court, leads inevitably to the conclusions that the adverse effects of such denial are numerous. They may be summarized as follows:

1. Our constitutional precepts do not allow for the existence of two systems for dispensing justice: one legal and the other extra-legal. No system of social sanctions, however designated, which is authorized to deprive a person of his freedom and to separate him from his family can be exempt from constitutional safeguards. It is an old observation of the classical economists that bad money pushes out and replaces the good money and, furthermore, that diverse social organs seek out their lowest common denominator. While the administration of criminal justice is undergoing a revolutionary change in this country, with a new emphasis upon individual safeguards, the juvenile process cannot be overlooked, even though characterized as civil and therapeutic. With most juvenile court judges alternating between adult and juvenile proceedings, it is apparent that a total separation of the two systems of justice is not possible. It is dubious whether the criminal aura can be kept from being injected into juvenile process and, likewise, it is questionable whether the absolute discretion of juvenile court can continue without effect upon criminal proceedings. That the two systems of justice cannot be totally separated is further illustrated by the practices of waiving jurisdiction over juveniles to adult courts (dealt with by this Court in the Kent case, 383 U.S. 541) and by the numerous questions (not previously presented to this Court) regarding double jeopardy and self-incrimination in connection with juveniles shuffled back and forth from juvenile to adult courts and even

tried as adults after first completing a juvenile "sentence" for the same offense.[19] "Actually, in about three-fourths of the states the youngster may eventually find himself in an adult penal institution as either a direct or an indirect result of juvenile court action. In about four-fifths of the states, his case can be waived to the adult court under certain conditions. In about one-half of the states, after he has been committed to and placed in an institution for juveniles, he may be transferred to an adult penal institution (see *Delinquent Children in Penal Institutions,* Children's Bureau pub., #415, 1965). Also, in a number of states, the juvenile court can commit directly to an adult penal institution. In a recent study, out of 1,087 juvenile courts, 288 or about 26% reported that they had the authority to commit directly to an adult penal institution."[20]

Emphasizing the therapeutic aims of the juvenile process does not automatically relieve it of the need for constitutional safeguards, any more than any other beneficial aims justify the means for their attainment. Even in non-criminal and administrative proceedings involving privileges and property rights, rather than personal liberty, there is a growing recognition of the applicability of constitutional safeguards. Willner v. Comm. on Character & Fitness, 373 U.S. 96, 107, 108 (1963); Kent v. Dulles, 357 U.S. 116 (1958); Murphy v. Waterfront Commission of New York Harbor, 378

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[19] See the discussion in Algase, The Right to a Fair Trial in Juvenile Court, 3 J. Family Law 292, 317 (1963).

[20] Letter of William H. Sheridan, Assistant Director, Division of Juvenile Delinquency Service, H.E.W. to Mrs. Barbara D. McGarry, American Parents Committee, Oct. 13, 1966.

U.S. 52 (1964). Cf. Aptheker v. Secretary of State, 378 U.S. 500 (1964). Also see Administrative Procedure Act, 60 Stat. 237 (1946), Secs. 5, 6, and 7 (U.S.C., Title 5, §§ 1004, 1005, 1006), which directly reflects deep Congressional concern with the provision of safeguards, equivalent to those in question here, in the administrative process.

There is little foundation to believe that the judge, the probation officer and the social worker in the juvenile process are in a better position to protect the rights of the charged child than were judges in criminal trials under the rule of *Betts* v. *Brady,* 316 U.S. 455 (1942).[21] It is inconceivable that the juvenile court, which is supposed to afford the child special protection, should deprive him of rights fought for and finally accorded to adults.

It is essential, therefore, that this Court extend to a youth in juvenile proceedings the basic rights previously recognized to exist in adult proceedings: the right to notice concerning the charge against him and adequate time and opportunity to prepare his response [Cole v. Arkansas, 333 U.S. 196 (1948)]; the right to counsel and the opportunity to have one appointed in case of need [Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966)]; the right to confrontation and cross-examination of witnesses [Pointer v. Texas, 380 U.S. 400 (1965)]; the privilege against self-incrimination [Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1

[21] For an account of the historical development towards allowing the accused counsel and the right to testify, see Beaney, The Right to Counsel in American Courts, Ch. 2, 1955; 2 Wigmore (3d ed. 1940) § 579. Gideon v. Wainright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966).

(1964)]; the right to a transcript and appellate review [Absent procedural safeguards, the juvenile court cannot be said to afford "a fair trial in a fair tribunal" under the standards of In re Murchison, 349 U.S. 133, 136 (1955) and an opportunity for review is therefore essential in order to correct any arbitrary and capricious abuses of discretion.]

Denial of these protections to the children who may be most in need of them cannot but fall short of "that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct" in the administration of justice. Clark, J. in Breithaupt v. Abram, 352 U.S. 432, 436 (1957).

2. The adversary system of justice still remains the best guaranty for maintaining the necessary balance between societal and individual interests and continues to afford the best protection against inequity and the abuse of discretion. The absence of counsel and failure to keep any transcript of the hearing deprives the child of needed protection while equally removing from society, which pays the bill, an important auditing and scrutiny device to protect against inadequate, wasteful or even illegal dispositions.

Despite the assertion of therapeutic aims, the juvenile process and the resultant disposition remain unnecessary unless the child's delinquency is adequately proven. The sponsors of this brief amicus curiae do not wish to burden the juvenile court with undue technicalities. Indeed, they support the proposition that we should seek ways to encourage the child's and his family's willing submission to the juvenile court program when applicable. Still, the case of Gerald Gault is a flagrant example of how informality turns into

vagueness and the parens patriae doctrine into an oppressive tool.

The testimony of the complaining witness in this case, Mrs. Cook, was never heard directly by the juvenile judge. Only the probation officer, Mr. Flagg, discussed the matter with her, over the telephone. Gault's specific role in making the obscene telephone call was never fully determined. The judge, the probation officer and the parents have different recollections of the child's own story. No witnesses were sworn in and no witnesses were cross-examined. The record in this case leads directly to the conclusion that the finding of Gerald Gault's guilt was not founded on evidence. Rather, the juvenile judge and the Arizona Supreme Court appear to have proceeded upon the premise that Gerald was a delinquent solely because he was charged with delinquency.

Subsequently, the juvenile judge reached the decision to commit Gerald Gault to a juvenile facility for an indeterminate period. What was the charge? Possibly, disturbing the peace; possibly, a habitual involvement "in immoral matters". There is no doubt that the words allegedly spoken by Gerald or his friend over the telephone were mischievous. There is doubt that, in their setting, these words were indeed malicious and of a very serious social threat.

No up-to-date report of Gerald's social and psychological background was brought before the court. The court allegedly relied on studies conducted prior to Gerald's placement on probation. Yet, in the absence of a record we have no way of assessing how extensive such previous studies were. There is no assurance that the tribunal which was specially designated to

seek out the best disposition for the juvenile indeed did its "home-work". Darkness shrouds the court's operations in the absence of constitutional spot-lights.

Thus, without an up-to-date review of the child's home conditions, and without regard to the question of the ability of both parents to cope with him, Gerald Gault was sent away to the "therapeutic" atmosphere of the Arizona State Industrial School. The discretion and the wisdom contained in this decision are of overwhelming concern not only to Gerald Gault but, also, to the public in Gila County, Arizona, and elsewhere. Is the public indeed protected by such action? Will the public expense of maintaining Gerald Gault in the Industrial School be justified in terms of his therapy or is it more likely that the commitment will turn the child into a greater public hazard after his exposure to higher forms of delinquency "education"? Absent counsel and other constitutional safeguards, no system of checks upon the juvenile judge's discretion is available to either the child or the public in Arizona. "Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." Douglas, J., U. S. v. Wunderlich, 342 U.S. 98, 101 (1951).

That constitutional safeguards have a useful place in the non-criminal therapeutic process is illustrated by recent information regarding availability of counsel in procedures leading to civil commitment into mental institutions. This is an area in which availability of counsel was previously unknown and commitment was a foregone conclusion once a commitment petition had been filed. Making counsel available in commitment cases resulted in the startling reports that as many as 15 percent of all commitment petitions have been denied

in Cook County, Illinois, during the period of December 1, 1963 and November 30, 1964, and 35 percent of all commitments were refused in the District of Columbia during 1964.[22]

For a listing of the constructive opportunities for counsel at virtually every stage of the juvenile proceedings, see Sheridan, Standards for Juvenile and Family Courts, U.S. Dept. of Health, Education and Welfare (1966) pp. 112-114.

3. Depriving children of legal safeguards available to adults is not only objectionable from a constitutional point of view, but tends also adversely to affect the development of such children towards responsible adult citizenship.[23] Our concept of justice has traditionally emphasized procedural guaranties over human discretion, adversary process over inquisitional justice. While the introduction of additional safeguards into the juvenile court will require more staff and the expenditure of more time—these are the expected costs of American justice.

It is possible that the warmth and affection, as well as the forbearance, available within the family circle sufficiently compensate for any denial of procedural safeguards. It is doubtful, however, whether unharn-

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[22] Defender Newsletter, National Legal Aid and Defender Association, Vol. 3, No. 2, p. 2, March 1966.

[23] The sponsors of this brief, while fully supporting the juvenile court's philosophy of "individualized justice" also believe that "offenses committed by young people should not be excused or condoned. The general public should be protected, and young people need to be held responsible for the consequences of their misconduct." See "Philosophy of the Court" in Sheridan, Standards for Juvenile and Family Courts, U. S. Dept. of Health, Education and Welfare (1966) p. 1.

essed discretion even within the family helps develop the child into a responsible rules-oriented adult. The assumption that the juvenile court, to whom often the parents themselevs come with an admission of failure, can perform this idealized parental function is based on hope rather than knowledge. Until juvenile courts and juvenile institutions are demonstrated to possess, in fact, the aptitudes and services that guarantee such parental role, constitutional safeguards are necessary. Absent a personal experience with the right to be heard, to be justly even if harshly treated, the child's memories and responses regarding juvenile court and commitment are not likely to contribute to a healthy adult respect towards constituted authority.

As Justice Rutledge remarked in Prince v. Massachusetts, 321 U.S. 158, 168 (1944) "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Whether the children who stray from the straight and narrow as some do can be expected to achieve this healthy growth if they are denied rights which they know adults to possess, is open to serious question.

That the treatment of juveniles in specialized courts is founded upon the parens patriae doctrine is not in itself dispositive of the problems involved. The decision to separate a child from its parents is indeed a weighty one, not only from the standpoint of the child, but also from that of the parents. It is a serious matter to sentence a criminal adult to imprisonment. How much more serious it is not only to confine a child, but thereby to rupture a family. The Arizona Supreme Court (Jurisdictional Statement, Appendix, p. 32) recognizes that the delinquent is "The child of, rather

than the enemy of society . . . ." Since this is the case as to all children, what is to be lost to society by accordingly the child all the protections that are accorded as of right to the enemies of society? It would seem that the burden of proof must rest on the state to show that the guaranties of notice, counsel, confrontation and cross-examination, review, transcript, and the privileges against self-incrimination will defeat or impair the purpose of the juvenile process. Still, to date, the aims of child rehabilitation have not been shown, and indeed cannot be shown, to have been impaired where due process rights have been observed in juvenile proceedings.

The sponsors of this brief amicus curiae are not unmindful of the problems inherent in opening the juvenile court to the whole range of constitutional safeguards. They certainly hope that the juvenile court is not turned into a "legalistic circus". The only protection against such developments is contained in the selection and training of both a juvenile judiciary and a ~~far~~ better fitted for the specialized function to which they must dedicate themselves. It is noteworthy, in this connection, that at this time three juvenile court judges are earmarked to cope with the host of juvenile problems in the District of Columbia, whose total population is estimated at 815,000. In West Berlin, whose population is estimated at 2,492,000, some 88 judges tend exclusively to the problems of the delinquent juvenile.[24] With a population only three times that of the District of Columbia, the Berlin courts have

[24] Logan and Kleeman, Berlin Report: Juvenile Delinquency Before the Wall and Afterward, 1963 Washington University Law Quarterly 296, 302.

29 times as many specially trained judges to handle the juvenile delinquency problem.

4. Despite its sixty-seven years of existence, little is known about the relative successes or failures of the juvenile court. In the absence of detailed records, in the absence of an opportunity for effective research or evaluation, this social experiment remains without an opportunity for progress. Sheltered from both public and professional scrutiny, the juvenile court has become suspect to those who are concerned with the denial of due process and to those suspicious of the coddling assertedly going on in chambers. After more than half a century as an unproven social experiment, juvenile process needs to go more into the open and is likely to benefit from the opportunity for a public assessment.

For the foregoing reasons, the tendency in recent years among the students as well as the practitioners of the juvenile court has been a reemphasis of constitutional safeguards. This is manifested in the Standard Juvenile Court Act (1959) prepared by the National Probation and Parole Association (now the Council on Crime and Delinquency) in cooperation with the National Council of Juvenile Court Judges and the U. S. Children's Bureau of the Department of Health, Education and Welfare. Section 19 of this Act reads as follows: "As soon as practicable after the filing of a petition, and prior to the start of a hearing, the court shall inform the parents, guardian, or custodian, and the child when it is appropriate to do so, that they have a right to be represented by counsel at every stage of the proceeding. If any of them requests it, but is found by the court to be financially unable to employ counsel, counsel shall be appointed by the court, and, if

necessary, compensated out of funds in the court's budget. Upon a final adverse disposition, if the parent or guardian is without counsel, the court shall inform them, and the child if it is appropriate to do so, of their right to appeal . . ." This section further provides that "stenographic notes or mechanical recordings shall be required as in other civil cases in the [highest court of general trial jurisdiction] . . . The general public shall be excluded . . ."

Like provisions are made in the proposed Uniform Juvenile Court Act[25] which has been prepared by a committee, under the direction of Professor Pirsig of the University of Minnesota, working in cooperation with the National Council on Crime and Delinquency and the Family Law Section of the American Bar Association. This draft, not yet approved by the Commissioners on Uniform State Laws, provides in Section 15: "(1) After the petition has been filed . . . the court . . . shall set a time for hearing and direct the issuance of a summons addressed to the child, its parents, guardian . . . requiring them to appear before the court . . . to answer the allegations of the petition . . . A copy of the petition or a summary of its allegations shall accompany the summons. (2) The summons shall state that a party is entitled to counsel in the proceedings and that the court will appoint counsel if the party is unable . . . to employ one." Section 17 of the proposed Uniform Juvenile Court Act provides further: "Hearings under this act shall be conducted by the court without a jury in an informal manner . . .

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[25] See mimeographed First Tentative Draft, Uniform Juvenile Court Act, June 3, 1966.

Minutes of the proceedings shall be kept by the court . . ." Attention should also be given to Section 19 which states: "A party is entitled to representation by counsel at all stages of the proceedings, and if unable to employ counsel by reason of his indigency, to have the court appoint counsel for him." Finally, Section 20 provides that: "A party is entitled to reasonable notice of the [facts intended to be introduced] [claims to be made] against him in the hearing, the opportunity to introduce evidence and otherwise be heard in his own behalf and to cross-examine witnesses appearing against him."

VI. CONCLUSION

It is, therefore, the conclusion of the sponsors of this brief amicus curiae that the best protection for both child and society requires the extension of constitutional safeguards to the juvenile process. If it is found on the basis of both past and future experience that certain constitutional guaranties are not necessary in the juvenile court, such guaranties should be specifically excluded. With the exception of such specifically excluded guaranties, the whole range of constitutional safeguards must be provided in the juvenile court.

Recognizing the importance, timeliness, and broad national application of the questions presented by this case, the undersigned file this brief in the hope that this Court's decision will establish the necessary standards of fairness for juvenile cour ts in order to give the

juvenile court a more effective role in protecting both children and society.

Respectfully submitted,

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